Supreme Court, U. S.
FILED
AUG 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

NO. 78-188

MELLON BANK, N.A.
Petitioner,

versus

SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

and

ASSOCIATES FINANCIAL SERVICES COMPANY, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of the State of South Carolina

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MELLON BANK, N.A.
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SOUTHLAND MOBILE HOMES OF SOUTH CAROLINA, INC.

and

ASSOCIATES FINANCIAL SERVICES COMPANY, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of the
State of South Carolina

Petitioner, Mellon Bank, N.A., prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, Opinions Numbers 20654 and 20655, entered on April 3, 1978. Rehearings were denied on May 10, 1978.

OPINIONS BELOW

The opinions of the Supreme Court of South Carolina are reported in 244 S.E.2d at 211 and 212 and appear in the Appendix, *infra*. (App. 15 & 17) The Order of the Court of Common Pleas for Sumter County is unreported and appears in the Appendix. (App. 26)

JURISDICTION

The opinions of the Supreme Court of South Carolina were entered on April 3, 1978. Timely petitions for rehearing were filed and were denied on May 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the courts of the State of South Carolina can, in a transitory cause of action, assert jurisdiction and venue over Petitioner, a national banking association chartered under the laws of the United States, headquartered in Allegheny County, Pennsylvania, and having no offices in the State of South Carolina.

STATUTES INVOLVED

The National Bank Act, 12 U.S.C. § 94, provides as follows:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

The McFadden Act, 12 U.S.C. § 36, provides in relevant part as follows:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following: . . .
>
> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .
>
> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

28 U.S.C. § 1348 provides as follows:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

S.C. Code § 36-2-803 (1976) appears in the Appendix (App. 32)

STATEMENT OF THE CASE

This case, alleging breach of contract, was brought by Southland Mobile Homes of South Carolina, Inc. ("Southland") against Associates Financial Services Company, Inc. ("Associates") and Mellon Bank, N.A. ("Mellon Bank") in the Court of Common Pleas for Sumter County, South Carolina. Associates answered and asserted a cross-complaint against Mellon Bank. Pursuant to South Carolina procedure Mellon Bank made a special appearance to challenge the jurisdiction of the court. (App. 24-25) The Court of Common Pleas for Sumter County entered its order dated February 16, 1977, asserting that it had jurisdiction over Mellon Bank pursuant to the South Carolina long-arm statute despite the provisions of 12 U.S.C. § 94. (App. 26)

Mellon Bank appealed to the Supreme Court of South Carolina. Although this case involves a single lawsuit, the South Carolina Supreme Court rendered two opinions, one dealing with the appeal as to Associates and one dealing with the appeal as to Southland. In the opinion dealing with the appeal as to Associates, the South Carolina Supreme Court in Opinion No. 20655 (App. 17) affirmed the Court of Common Pleas for Sumter County, holding (1) that the state court had jurisdiction over Mellon Bank pursuant to the state long-arm statute, S.C. Code § 36-2-803 (1976) (App. 32); (2) that Mellon Bank was "located" in the State of South Carolina within the meaning of 12 U.S.C. § 94; and (3) that Mellon Bank was operating a branch bank in Sumter County, South Carolina, within the meaning of 12 U.S.C. § 36 because it purchased commercial (chattel) paper from Associates, which had acquired the paper from Southland, which in turn had previously acquired the paper from its customers.

In a separate opinion dealing with the appeal as to Southland the South Carolina Supreme Court held that the then attorney for Mellon Bank was several days late in perfecting the appeal against Southland and affirmed

the dismissal of the appeal in Opinion No. 20654. (App. 15) Rehearings of these decisions were denied on May 10, 1978. (App. 23-24)

Since no further review of the decisions is possible under South Carolina law, Petitioner seeks review by this Court of the important federal questions decided. Pursuant to subsection 5 of Rule 23 of this Court, it is appropriate to consolidate review of both decisions into one Petition for Certiorari.

REASONS FOR GRANTING CERTIORARI

This case presents novel and important questions involving the application of federal jurisdictional and venue statutes pertaining to transitory actions against national banks in state courts.

The case involves an attempt by the state courts of South Carolina to assert jurisdiction over an out-of-state national bank pursuant to a state long-arm statute and contrary to the provisions of the National Bank Act and the Supremacy Clause of Article VI of the United States Constitution.

The latest decision of this Court involving 12 U.S.C. § 94 was *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977). However, that case addressed itself only to an intra-state application of the statute. The question decided was whether a national bank having its principal office in one county of the State of Georgia could be sued in another county of the same state in which it maintained an authorized branch. Here, Mellon Bank is headquartered and chartered as a national bank in Allegheny County, Pennsylvania, but the South Carolina courts have asserted jurisdiction over it, even though it has no offices within the State of South Carolina and can have none under the McFadden Act, 12 U.S.C. § 36(c). The South Carolina courts have applied a state statute in derogation of federal statutes and have done violence to the interpretation of federal statutes. This precedent should not be permitted to stand.

A. THE SOUTH CAROLINA COURTS HAVE ASSERTED JURISDICTION OVER AN OUT-OF-STATE NATIONAL BANK IN A TRANSITORY ACTION PURSUANT TO A STATE LONG-ARM STATUTE IN DEROGATION OF THE NATIONAL BANK ACT AND ALSO IN DEROGATION OF THE SUPREMACY CLAUSE OF ARTICLE VI OF THE UNITED STATES CONSTITUTION.

In asserting jurisdiction over Mellon Bank, the South Carolina courts have relied upon the South Carolina long-arm statute, S. C. Code § 32-2-803 (1976). (App. 32) Without conceding that jurisdiction would be obtained under this statute if it were applicable, Petitioner asserts that such a state statute cannot be applied in derogation of federal statutes to reach an out-of-state national bank.

Federal statutes govern exclusively where a national bank may be sued on a transitory cause of action. For a century decisions of this Court have consistently held that national banks are creatures of federal statutes and that their regulation and amenability to suit are governed exclusively by federal law. The following quotations will suffice to illustrate this point:

> The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit. *Van Reed v. People's National Bank,* 198 U.S. 554, 555 (1905); quoted in part in *Mercantile National Bank v. Langdeau,* 371 U.S. 555, 558-9 (1963).

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court. *Davis v. Elmira Savings Bank,* 161 U.S. 275, 283 (1896).
>
> Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them [national banks], nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single State cannot give." Against the national will "the States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." *Farmers' & Mechanics' National Bank v. Dearing,* 91 U.S. 29, 34 (1875) (citations omitted).

Controlling is *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963). In *Langdeau* an action was brought in Travis County, Texas, against a national bank which was located in Dallas County, Texas. The Texas court relied upon venue provisions in the Texas Rules of Civil

Procedure. This Court reversed. The *Langdeau* decision is absolutely clear on two points: (a) the federal venue and jurisdictional statutes are mandatory and not permissive, and (b) state jurisdictional and venue statutes do not control suits brought in state court against national banks.

Analogous is *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). That case held that the venue provisions of the Securities Exchange Act of 1934 did not supersede the provisions of 12 U.S.C. § 94 in a suit brought against an out-of-state national bank alleging violation of the Securities Exchange Act. If an apparently conflicting federal statute cannot override the provisions of the National Bank Act, *a fortiori* a state statute cannot.

Thus, the attempts of the Supreme Court of South Carolina and the Court of Common Pleas for Sumter County to invoke state court jurisdiction over Mellon Bank pursuant to the South Carolina long-arm statute are complete nullities. To allow this decision to stand would emasculate the forum requirements of the National Bank Act, both as to its plain language and as interpreted by this Court.

B. THE SOUTH CAROLINA COURT'S INTERPRETATION OF "LOCATED" UNDER 12 U.S.C. § 94 CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

In no way and in no sense of the word can Mellon Bank be deemed "located" in the State of South Carolina as that term is used in 12 U.S.C. § 94 and 28 U.S.C. § 1348. As shown in an affidavit in the record in support of the special appearance of Mellon Bank to contest jurisdiction, Mellon Bank had no offices, employees, subsidiaries or affiliates in the State of South Carolina. Basically, all Mellon Bank did was purchase chattel paper from Associates, which had acquired the paper from Southland, which in turn had acquired it from customers of Southland who

had purchased mobile homes. The same situation was presented in *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963), where a national bank headquartered in Michigan purchased installment paper from a house trailer dealer in Nebraska. Like the petitioner in *Robertson*, Mellon Bank cannot be sued outside its home state without its consent. To the same effect is *National Bank of North America v. Associates of Obstetrics and Female Surgery*, 425 U.S. 460 (1976). There, an attempt was made in state court in Utah to sue a national bank headquartered in New York. Like the Michigan bank and like Mellon Bank, the New York bank had no offices or agents in the state of the attempted forum. This Court vacated the judgment of the Utah Supreme Court, restating the doctrine that the provisions of 12 U.S.C. § 94 are mandatory, not permissive, and do not permit a state court to reach beyond its boundaries to assert jurisdiction over a national bank in another state.

Although it does not reach the statutory interpretation questions, *Bank of America v. Whitney Central National Bank*, 261 U.S. 171 (1923), held that jurisdiction could not be had over a national bank under factual circumstances similar to the case at bar. The Whitney Central National Bank was sued in district court in New York although its headquarters and banking offices were located in New Orleans, Louisiana. Whitney had correspondent relationships with six banks in the State of New York where it maintained deposit accounts. These correspondent banks, among other things, paid drafts drawn on Whitney against letters of credit of Whitney issued in New Orleans, received securities on behalf of Whitney, and made payment for such securities. This Court held that Whitney was not "found" within New York State where it was sued.

C. THE SOUTH CAROLINA COURTS HAVE INTERPRETED THE TERM "BRANCH" BANK IN A MANNER TOTALLY INCONSISTENT WITH FED-

ERAL STATUTES AND DECISIONS OF THIS COURT.

The holding by the trial and appellate courts of South Carolina that Mellon Bank, by purchasing chattel paper from respondent Associates in South Carolina, created a branch bank of Mellon Bank in South Carolina is ridiculous on its face. 12 U.S.C. § 36(f) defines a branch bank as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office or any branch or place of business located in any State or Territory of the United States or in the District of Columbia *at which deposits are received, or checks paid, or money lent.* (Emphasis added)

There is nothing in the record below to suggest that Mellon was in any way conducting a banking operation or operating a branch bank in the State of South Carolina. There is nothing to indicate that it received deposits, paid checks or loaned money in that state.

This Court discussed this definition in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969). That case arose in Florida, where branch banking is prohibited. The national bank, which was headquartered and chartered in Florida, established an off-premises receptacle for deposit of cash and checks. It operated an armored car service to bring the material left in the receptacle to the bank itself. This Court correctly held the receptacle to be a "branch" under the federal statute and within the prohibition of the Florida law against branch banking. Thus, the alleged branch in *Dickinson* was an off-premises means of receiving deposits.

It is quite apparent that Mellon Bank was not receiving deposits, paying checks or lending money in South Carolina. The South Carolina courts have asserted that Mellon Bank was lending money in South Carolina, but this assertion is not correct. Mellon Bank was purchasing in-

stallment paper which had been given by purchasers of mobile homes to a South Carolina dealer. Mellon Bank was not lending money either to the dealer or to the persons who had purchased the mobile homes. It was purchasing an investment as it might purchase bonds. The affidavit of the officer of Mellon Bank given to the court in resisting jurisdiction is quite clear on the point. The trial court quoted the following two paragraphs from the affidavit:

> That Mellon Bank, N.A. maintains no office, retail or wholesale, in the State of South Carolina. That there are no employees or agents of Mellon Bank, nor are there any employees or agents of any subsidiary or affiliate in the State of South Carolina.
>
> That the Defendant, Mellon Bank, N.A. does purchase commercial paper from a number of financing institutions throughout the country as a regular course of business. One of these financial institutions from which it purchases commercial paper is Associates Financial Company, Inc., an Indiana corporation. Associates Financial does do business in South Carolina and as a result of this some of the commercial paper which Mellon Bank has purchased from Associates Financial did originate in South Carolina. However, this is a matter of Mellon Bank doing business with a corporation which in turn does business in the State of South Carolina rather than Mellon Bank doing any business in the State of South Carolina. (App. 27)

There is no factual basis for saying that Mellon Bank was operating a "branch" in South Carolina in defiance of the McFadden Act, 12 U.S.C. § 36(c), when, indeed, it had nothing resembling an office in the State of South Carolina.

D. THERE IS NO LEGAL OR FACTUAL BASIS FOR HOLDING THAT MELLON BANK HAS IN ANY WAY WAIVED THE PROVISIONS OF 12 U.S.C. § 94.

The Supreme Court of South Carolina did not treat the question of waiver, but the trial court held that Mellon Bank had waived its immunity from suit in South Carolina. (App. 29) Apparently, this holding was based upon the relationship between Mellon Bank and Associates and the fact that Mellon Bank had enforced installment sale contracts in the courts of South Carolina.

Although this Court has not defined waiver under 12 U.S.C. § 94, the cases which have held that a waiver of jurisdictional objections had occurred have generally based the holding upon conduct which occurred after the commencement of the lawsuit. Here, Mellon Bank entered a special appearance to contest jurisdiction (App. 24-25) and has contested the jurisdiction of the South Carolina courts throughout this litigation. This case is thus distinguishable from those which hold there was a waiver. See Anno., 1 A.L.R.3d 904.

E. THE STATE SUPREME COURT DECISIONS ARE APPROPRIATE FOR REVIEW AT THIS TIME.

Although the decisions of the South Carolina Supreme Court do not dispose of the merits of this case, they constitute a final judgment on the jurisdictional and venue issues, and it would serve no purpose for this Court to delay review of the federal questions presented. The state court decisions are final within the meaning of 28 U.S.C. § 1257 and are thus now ripe for review. This case is analogous to *Local 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963), wherein this Court stated as follows:

> [W]e believe our power to review this case rests upon solid ground. The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction nor is it the question of whether federal or state law governs a case properly before the Georgia courts. What we do have here is a question of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power . . . . 371 U.S. at 548 (citations omitted).

By similar reasoning this Court has reviewed decisions of state courts holding that jurisdiction and venue existed as to national banks although the cases had not yet been determined on the merits. *Citizens & Southern National Bank v. Bougas*, 434 U.S. 36 (1977); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

The jurisdictional and venue questions here are severable from the merits of the case, and a trial on the merits would add nothing to the record for the determination of the jurisdictional and venue questions.

CONCLUSION

The decision of the Supreme Court of South Carolina conflicts with the National Bank Act and the decisions of this Court construing that Act. A reversal of this decision is required.

Wherefore, for the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Southland Mobile Homes of South Carolina, Inc., a South Carolina Corporation — Respondent,

v.

Associates Financial Services Company, Inc., and Mellon Bank, N.A. of which Mellon Bank, N.A. is — Appellant.

Appeal From Sumter County

Dan F. Laney, Judge

Opinion No. 20654
Filed April 3, 1978

AFFIRMED

Drawdy Law Offices, of Columbia, for appellant.

Donald E. Rothwell, of Columbia, for Associates Financial Services Company, Inc.

Weinberg, Warner, Brown & McDougall, of Sumter, for respondent.

GREGORY, A. J.: This action was brought by Southland Mobile Homes of South Carolina, Inc. [Southland] against Associates Financial Services Company, Inc. [Associates Financial] and Mellon Bank, N.A. [Mellon Bank] to recover damages for breach of contract. Associates Financial cross-claimed against its co-defendant, Mellon Bank. Mellon Bank challenged the circuit court's jurisdiction by special appearance and the Honorable Dan F. Laney held the court had jurisdiction.

Mellon Bank filed notice of intention to appeal on February 26, 1977. The proposed case and exceptions were served on counsel for Associates Financial within thirty days thereafter. The proposed case and exceptions were mailed to counsel for Southland on March 30, 1977, more than thirty days after the notice of intention to appeal was filed.

On motion of Southland, Judge Laney dismissed Mellon Bank's appeal as to Southland for failing to serve the proposed case and exceptions within the time allowed by Section 18-9-70, 1976 Code of Laws of South Carolina, and Circuit Court Rule 49. Mellon Bank appeals from Judge Laney's order dismissing its appeal.

Where, as here, the appellant gave timely notice of intention to appeal to this Court but failed to serve its proposed case and exceptions within the time provided by the statute and Circuit Court Rules, it was the duty of the circuit judge to dismiss the appeal. Associated Petroleum Carriers v. Mutual Properties, Inc., 235 S.C. 195, 110 S.E.2d 861 (1959).

AFFIRMED.

LEWIS, C. J., LITTLEJOHN, NESS and RHODES, J. J., concur.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Southland Mobile Homes of South Carolina, Inc., a South Carolina Corporation, Plaintiff,

v.

Associates Financial Services Company, Inc., and Mellon Bank, N.A. of which Associates Financial Services Company, Inc. is Respondent,

and

Mellon Bank, N.A. is Appellant.

Appeal From Sumter County

Dan F. Laney, Judge

Opinion No. 20655

Filed April 3, 1978

AFFIRMED

Drawdy Law Offices, of Columbia, for appellant.

Weinberg, Bryan, Warner, Brown & McDougall, of Sumter, for plaintiff.

Donald E. Rothwell, of Columbia, for respondent.

GREGORY, A. J.: This action was brought by Southland Mobile Homes of South Carolina, Inc. [Southland] against Associates Financial Services Company, Inc. [Associates Financial] and Mellon Bank, N.A. [Mellon Bank] to recover damages for breach of contract. Associates Financial cross-claimed against its co-defendant, Mellon Bank. Mellon Bank challenged the circuit court's jurisdiction by special appearance, and appeals the lower court's order finding the circuit court has jurisdiction over Mellon Bank.

Mellon Bank served both Southland and Associates Financial with notice of its intention to appeal the lower court's jurisdictional finding. On the subsequent motion of Southland, however, the lower court dismissed Mellon Bank's appeal as to Southland for failing to serve the proposed case and exceptions within the time allowed by Section 18-9-70, 1976 Code of Laws of South Carolina, and Circuit Court Rule 49. We affirmed that order in Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Company, Inc. and Mellon Bank, N. A., ... S.C. ....., ... S.E.2d ..... (1978) (Op. No. 20654, filed April 3, 1978).

Mellon Bank's appeal as to Associates Financial was submitted without oral argument under Rule 29 of our Rules of Practice.

The sole question presented by this appeal is whether the circuit court has jurisdiction over Mellon Bank.

On appeal from an order of the lower court finding it has jurisdiction, this Court will affirm the lower court's finding unless it is unsupported by the evidence or influenced by error of law. Jacobs v. Association of Independent Colleges and Schools, 265 S.C. 459, 219 S.E.2d 837 (1975).

Mellon Bank is a national banking association organized under the provisions of Title 12 of the United States Code. Its principal place of business is located in Allegheny County, Pennsylvania.

Both jurisdiction and venue in actions against national banks are governed by federal statutes.

28 U.S.C.S. § 1348 (1977) controls jurisdiction:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12 [12 U.S.C.S. §§ 21 et seq.], to enjoin the Comptroller of the Currency, of any receiver acting under his direction, as provided by such chapter.
>
> All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

12 U.S.C.S. § 94 (1977) controls venue:

> Suits, actions, and proceedings against any association under this title may be had in any district, or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

Under 28 U.S.C.S. § 1348 Mellon Bank is deemed a citizen of South Carolina and thus subject to the jurisdiction of our courts if it is *located* here.

Under 12 U.S.C.S. § 94 venue is proper in "any State, county, or municipal court . . . having jurisdiction in similar cases" where Mellon Bank is *located*.

In Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975), cert. denied 423 U.S. 1048, 96 S.Ct. 774, 46

L.Ed.2d 636, this Court held that a national bank is *located* in any county in this State in which it has a branch bank. The United States Supreme Court affirmed the principle of that holding in Citizens and Southern National Bank v. Bougas, ... U.S. ....., 98 S.Ct. 88, 54 L.Ed.2d 218 (1977).

For purposes of national banking association, branch banks are defined in 12 U.S.C.S. § 36 (1977). Subsection (f) of that section provides as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The United States Supreme Court discussed 12 U.S.C.S. § 36(f) in First National Bank v. Dickinson, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), reh. denied 396 U.S. 1047, 90 S.Ct. 677, 24 L.Ed.2d 693:

> Although the definition [12 U.S.C.S. § 36(f)] may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. It should be emphasized that, since § 36(f) is phrased in the disjunctive, the offering of any one of the three services mentioned in that definition will provide the basis for finding that "branch" banking is taking place. Thus not only the taking of deposits but also the paying of checks or the lending of money could equally well provide the basis for such a finding. 396 U.S. at 135, 90 S.Ct. at ....., 24 L.Ed.2d at 320-321.

Thus, if Mellon Bank has received deposits, paid checks, or lent money in a county in this State it will have branch banked in that county and will be considered located there.

Based on the affidavit of Bruce Gordon, Associates Financial's operations manager in Sumter County, and an attached contract between Associates Financial and Mellon Bank dated December 20, 1972, the lower court made the following findings:

> Without question the exhibits and evidence presented establish that the Associates' office in Sumter, South Carolina, received checks made payable to the Mellon Bank, that it loaned money of the Mellon Bank and conducted all business necessary to be completed with the receipt of the funds and the disbursement of them pursuant to explicit directions of the Mellon Bank as to all places of procedure. Upon a review of all of the facts it would appear that branch banking was in fact taking place at the Associates' office for the benefit of Mellon throughout the tenure of the contract between these defendants.

The lower court found Mellon Bank had received and loaned money in Sumter County through Associates Financial and thus was branch banking in Sumter County within the meaning of 12 U.S.C.S. § 36(f). Additionally, the lower court found Mellon Bank had sufficient contacts with this State to permit the exercise of State court jurisdiction under Section 36-2-803, 1976 Code. Since these findings are supported by the evidence and were not influenced by error of law, they are binding on this Court on appeal. Jacobs, *supra*.

Clearly the Sumter County Court of Common Pleas would have jurisdiction over this action unless Mellon Bank is granted an exemption by the cited federal statutes. Under 12 U.S.C.S. § 36(f) Mellon Bank was branch banking in Sumter County through Associates Financial and thus is located there. Holson, *supra*. Accordingly, Mellon Bank is a citizen of this State and subject to the jurisdiction of our courts under 28 U.S.C.S. § 134, and venue is proper in Sumter County under 12 U.S.C.S. § 94.

Finding no error in the order of the lower court, we affirm.

LEWIS, C. J., LITTLEJOHN, NESS and RHODES, J. J., concur.

DENIAL OF PETITION FOR REHEARING AS TO OPINION NO. 20654

Petition Denied

S/ J. Woodrow Lewis

S/ Bruce Littlejohn

S/ J. B. Ness

S/ Wm. L. Rhodes, Jr.

S/ George T. Gregory, Jr.

May 10, 1978

[Note: The Petition for Rehearing was denied by the foregoing order endorsed on the cover of the petition by the justices of the South Carolina Supreme Court.]

DENIAL OF PETITION FOR REHEARING AS TO OPINION NO. 20655

Petition Denied

S/ J. Woodrow Lewis

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S/ Wm. L. Rhodes, Jr.

S/ George T. Gregory, Jr.

[Note: The Petition for Rehearing was denied by the foregoing order endorsed on the cover of the petition by the justices of the South Carolina Supreme Court.]

STATE OF SOUTH CAROLINA
County of Sumter

IN THE COURT OF COMMON PLEAS

Southland Mobile Homes of South Carolina, Inc.,
a South Carolina Corporation, Plaintiff,

vs.

Associates Financial Services Co., Inc.,
and The Mellon Bank, Defendants.

SPECIAL APPEARANCE

The Defendant, The Mellon Bank, by and through its undersigned attorneys, does herewith make a Special Appearance for the sole purpose of asserting the lack of jurisdiction of this Court over this said Defendant in this action,

The ground of this objection being, *inter alia,* that whereas this Defendant is a National Banking Association organized under the Provisions of Title twelve (12) of the United States Code; and whereas this said Defendant is located in the County of Allegheny, in the State of Pennsylvania; and whereas Federal Law requires that suits against this said Defendant can only be had in a State Court in the state and county in which the said Defendant is located, this Court is without jurisdiction over this said Defendant in this action,

WHEREFORE, this Defendant requests that this Court determine that this said Defendant is not subject to the jurisdiction of this Court in this action.

DRAWDY & NICHOLSON

S/ BY: William J. Nicholson

Columbia, South Carolina
June 4, 1975

STATE OF SOUTH CAROLINA
County of Sumter

IN THE COURT OF COMMON PLEAS

Southland Mobile Homes of South Carolina, Inc.,
a South Carolina Corporation, Plaintiff,

vs.

Associates Financial Services Co., Inc.,
and The Mellon Bank, Defendants.

SPECIAL APPEARANCE

The Mellon Bank, by and through its undersigned attorneys, having already made a Special Appearance with respect to the Summons and Complaint of the Plaintiff for the sole purpose of asserting the lack of jurisdiction of this Court over The Mellon Bank in this action, does herewith make a Special Appearance with respect to the Cross-Complaint of the Associates Financial Services Co., Inc., for the sole purpose of asserting the lack of jurisdiction of this Court over The Mellon Bank in this action.

The ground of this objection being, *inter alia,* that whereas this Defendant is a National Banking Association organized under the Provisions of Title Twelve (12) of the United States Code; and whereas this said Defendant is located in the County of Allegheny, in the State of Pennsylvania; and whereas Federal Law requires that suits against this said Defendant can only be had in a State Court in the State and County in which the said Defendant is located, this Court is without jurisdiction over this said Defendant in this action.

WHEREFORE, this Defendant requests that this Court determine that this said Defendant is not subject to the jurisdiction of this Court in this action.

DRAWDY & NICHOLSON

S/ BY: William J. Nicholson

Columbia, South Carolina
June 20, 1975

ORDER OF COURT OF COMMON PLEAS FOR SUMTER COUNTY FILED FEBRUARY 16, 1977

(Reprinted from transcript of record before Supreme Court of South Carolina, pp. 6-13)

ORDER (CONFIRMING JURISDICTION)

This matter came before the Court upon the Special Appearance of The Mellon Bank by and through William J. Nicholson and Leo A. Dryer, Jr., of the law offices of J. Wesley Drawdy, on February 13, 1977.

Also present were M. M. Weinberg, Jr., attorney for the Plaintiff, and Donald E. Rothwell, attorney for Associates Financial Services Company, Inc.

This action was instituted by Southland Mobile Homes of South Carolina, a South Carolina corporation, on the 12th day of May, 1975, against Associates Financial Services Company, Inc. and The Mellon Bank. Shortly after service, Associates Financial Services Company, Inc., answered and cross-claimed against The Mellon Bank. The Mellon Bank then served Notice of Special Appearances as to the Complainant and the Cross-Complainant.

Mellon takes the position that as a national banking association organized under the provisions of Title 12 of The United States Code located in Allegheny County, Pennsylvania, that Federal Law requires that all actions against Mellon be brought only in the State and County in which Mellon is located and that therefore this Court has no jurisdiction over it.

The Defendant, The Mellon Bank, submitted an affidavit of Charles B. Jarrett, Jr., Vice President and Counsel of Mellon Bank, N.A., dated the 19th day of November, 1976, and the arguments presented by legal counsel for Mellon basically restated the contents of this affidavit, and, in addition, set out that Mellon was not subject to the jurisdiction of this Court due to the immunity provided by Title 12 of the United States Code.

It is appropriate to make reference to certain portions of Mellon's affidavit, as follows:

> 3. That Mellon Bank, N.A. maintains no office, retail or wholesale, in the State of South Carolina. That there are no employees or agents of Mellon Bank, nor are there any employees or agents of any subsidiary or affiliate in the State of South Carolina.
>
> 9. That the Defendant, Mellon Bank, N.A. does purchase commercial paper from a number of financing institutions throughout the country as a regular course of business. One of these financial institutions from which it purchases commercial paper is Associates Financial Company, Inc., an Indiana corporation. Associates Financial does do business in South Carolina and as a result of this some of the commercial paper which Mellon Bank has purchased from Associates Financial did originate in South Carolina. However, this is a matter of Mellon Bank doing business with a corporation which in turn does business in the State of South Carolina rather than Mellon Bank doing any business in the State of South Carolina.

Both of the paragraphs taken out of the affidavit make direct reference to the crux of the argument before the Court.

The Defendant, Associates, submitted an affidavit of its Operations Manager in Sumter, South Carolina, dated the 13th day of January, 1977. A review of this affidavit, together with attachments and exhibits presented conclusively shows that the Bank had full control of all activities of Associates insofar as any procedures connected with the Associates' handling of Mellon's loans in this State. It further appears that Associates was merely a service company and Mellon's agent for the consummation

of the various transactions upon which this action is founded; and this was buttressed by the deposition testimony of A. H. Henderson, a former manager of Associates in Sumter. Mr. Henderson fully corroborates the affidavit submitted by Associates insofar as it relates to the transactions between Mellon and Associates during the entire tenure of the contract between the parties, and further shows the relationship between these Defendants as set out hereinabove.

At the present time the only construction that could be given to the relationship of the Defendants is that Associates was, in fact, the agent of Mellon for the purpose of buying retail paper on mobile homes and for handling the transactions with the seller of said mobile home and paper, all being done subject to the explicit directions of Mellon.

The Defendant, Mellon, apparently relies upon Title 12, Sec. 94 of the U. S. Code as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or territorial Court of the United States held within the district in which such association may be established, or in any State, County, or municipal Court in the City or County in which said association is located having jurisdiction in similar cases. R.S. 5198; Feb. 18, 1875, 80 1, 18 Stat. 320; Mar. 3, 1911, c. 231, 291, 36 Stat. 1167."

Therefore, a decision must be made as to whether or not this particular Section under the facts and circumstances as here presented is sufficient to deprive this Court of jurisdiction.

A construction of this portion of the U.S. Code of Laws is found in Title 12, Sec. 36(F) of the U.S. Code of Laws:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

It is asserted by the Defendant, Associates, and by the Plaintiff that Mellon's activities through and by its Agent, Associates, at the Sumter location did, in fact, constitute Associates a branch bank of Mellon for the purpose of this action.

Without question the exhibits and evidence presented establish that the Associates' office in Sumter, South Carolina, received checks made payable to the Mellon Bank, that it loaned money of the Mellon Bank and conducted all business necessary to be completed with the receipt of the funds and the disbursement of them pursuant to explicit directions of the Mellon Bank as to all places of procedure. Upon a review of all of the facts it would appear that branch banking was in fact taking place at the Associates' office for the benefit of Mellon throughout the tenure of the contract between these Defendants.

A similar situation was considered by the U. S. Supreme Court in *First National Bank in Plant City, Florida v. Dickinson,* 90 Supreme Court 337 (1969), wherein the United States Supreme Court decided in a situation very similar to this that the activities such as conducted by Associates for and in behalf of Mellon constituted the establishment of a branch bank. This matter has been treated in South Carolina in the case of *Holsen v. Gosnell,* 216 S.E. 2d 539, S.C. decided in 1975 which appears to adopt the position set out above.

In addition to the establishment of the branch bank, the position was taken by this Plaintiff and this Defendant, Associates, that the immunity of Mellon was waived by the actions of Mellon in that during the tenure of the contract between Mellon and Associates, and prior to this time, Mellon had been conducting business within the

State of South Carolina, had been discounting paper, lending money and suing on the contracts. It was shown to the Court that the public records of the State of South Carolina contain several legal actions involving suits upon security agreements by Mellon against various Defendants and under the authority of the decision of the *First National Bank vs. Morgan,* cited at 132 U.S. 141 (1889), the Bank has exhibited conduct which is inconsistent with the retention of its immunity from the jurisdiction of this Court. It has waved such immunity, if, in fact, it did have the same.

Without question, jurisdiction may be established by waiver, as has been so decided in various cases throughout this country; *Western National Bank of Amarillo vs. Bobby Lawrence Hix, et al.,* Tex. Civ. App. 1976, 533 S.W. 2d 859; *Bank of America v. Whitney Central National Bank,* 261 U.S. 171 (1923); *County of Okeechobee et al. vs. Florida National Bank of Jacksonville, et al.,* 112 Fla. 309 150 So. 124 (1933), *Joseph Lichtenfels, et al. vs. North Carolina National Bank, et al.,* 260 N.C. 146, 132 S.E. 2d 360 (1963) and *Continental National Bank et al. vs. Folsom,* 78 Ga. 449, 3 S.E. 269 (1887).

A review of these authorities easily establishes that this question of waiver has been considered and decided in numerous jurisdictions, and these courts have held without exception that National banks are estopped from claiming the privilege of immunity when they have performed acts inconsistent with a retention of immunity, exactly as the conduct of Mellon is exhibited herein.

In addition to the foregoing, it would appear to this Court that this matter is completely controlled by the Uniform Commercial Code as adopted by this State in 1966.

All of the transactions which arose out of the contractual agreement entered into between Associates and Mellon Bank, concern security agreements governed by Title 10 of the South Carolina Code of Laws, as amended. The testimony, arguments, affidavits, and pleadings before me,

clearly indicate that there is sufficient cause to adjudicate that there is jurisdiction over the Mellon Bank pursuant to and under South Carolina Code Sections 10.2-801 through 803 10.2. This statute expressly holds that personal jurisdiction against an out of state Defendant may be based on a number of different acts by said Defendant and it appears from the argument of counsel and Memorandum submitted that this statute would apply because of the fact: "(a) that the Defendant was transacting business within this state; (c) that the Defendant committed a tortious act in whole or in part within this state provided the Plaintiff's view of the facts are correct and, further (d) that the Defendant regularly did business and solicited business within this state and derived substantial revenue from services and goods furnished within the state; (e) Defendant appears to have an interest in real property within this state; (g) the Defendant appears to have entered into a contract to be performed in whole or in part within this state;"

It clearly appears that the acts of the Defendant have brought it clearly within the purview of this statute insofar as jurisdiction is concerned. This Court, does, in addition, make substantial note of the cases of *Leroy Ellison, et al. vs. Rock Hill Printing and Finishing Company, et al.,* 347 F. Supp. 436 (1972), *William B. Peeler vs. South Carolina Helicopters, Inc., et al.,* 211 S.E. 2d 344 (1975), and *The Duplan Corporation v. Deering Milliken, Inc., et al.,* 334 F. Supp. 703 (1971) in coming to its conclusion that there does exist jurisdiction, in all particulars, over The Mellon Bank.

IN PASSING, this Court will make note of what appears to be at least one substantial land transaction within the jurisdiction of the State of South Carolina which establishes the active participation in business transactions in this State by The Mellon Bank and its subsidiaries.

NOW, THEREFORE, it appears to the Court that the Mellon Bank is subject to suit in this state by virtue of the

fact that it has, during the time in question, conducted a system of branch banking within the borders of this State, and, further, that if it enjoyed any immunity which under the more recent statutes does not appear to be the case, that this immunity has effectively been waived by the conduct of Mellon as exhibited in the deposition of A. H. Henderson, and the various affidavits presented. It further appears that notwithstanding all of the foregoing, that the Uniform Commercial Code as adopted by the State of South Carolina completely controls the situation between the parties hereto and under this Code, Mellon is subject to suit in the State of South Carolina.

NOW, THEREFORE, it is herewith

ORDERED, ADJUDGED AND DECREED: That the motion made by the Defendant, The Mellon Bank, in its special appearance before this Court, be, and the same is hereby overruled.

AND IT IS SO ORDERED:

Dated February 16, 1977
Sumter, South Carolina

DAN F. LANEY, JR., JUDGE
THIRD JUDICIAL CIRCUIT

S.C. Code § 36-2-803 (1976).

Personal jurisdiction based upon conduct.

(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in the State;

(c) commission of a tortious act in whole or in part in this State;

(d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State; or

(e) having an interest in, using, or possessing real property in this State; or

(f) contracting to insure any person, property or risk located within this State at the time of contracting; or

(g) entry into a contract to be performed in whole or in part by either party in this State; or

(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be subject to the provisions of § 15-7-100(3).

[Note: S.C. Code § 15-7-100(3) authorizes a change of venue when the convenience of witnesses and the ends of justice would be promoted by the change.]